No. 15515

IN THE

UNITED STATES

Court of Appeals

FOR THE NINTH CIRCUIT

RALPH B. DEFENBACH, as Trustee,
Appellant,

vs.

R. MAX ETTER and
PAUL C. KEETON,
Appellees.

No. 15515

APPELLANT'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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Acme Printing Co.

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STATEMENT AS TO JURISDICTION

This Court and the District Court have jurisdiction by virtue of the interpleader statute, 28 USCA §1335 (R. 9), and by virtue of the holding of this Court in *U.S. v. Moulton and Powell,* 188 F. (2d) 865. This Court there held that where a fund was paid in to the registry of the District Court, and under Washington law and procedure an attorney's charging lien pursuant to RCW 60.40.010 was filed against the fund, the District and Circuit Courts were the proper forums to determine the amount of the attorney's charge. The case at bar involves interpleader of life insurance proceeds, with the sole question being the amount of attorney's charging lien for their services in recovery of the interpleaded fund (R. 7-8).

STATEMENT OF THE CASE

This is an appeal from a judgment of the trial court allowing appellees $15,000 as attorneys' fees for representation of appellant ,as assignee for the benefit of creditors, in the trial of interpleader actions in the District Court.

Background Facts

On September 22, 1953, Robert Weyen divorced his wife, Mary (R. 10). In the decree he was awarded ten insurance policies. The next day he executed an agreement, naming his attorney, Stanfill, the beneficiary of a trust, the corpus of which was the ten policies (R. 11); on death the trustee was to use the proceeds for the benefit of Weyen's children, but Weyen made the following reservation in the trust agreement:

"The donor specifically reserves the right, during the term of this trust, to pledge any of such policies as collateral, or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby understood that the signature of the Trustee herein named shall not be required to join in the application for said loans." (R. 11)

Prior to November 16, 1954, Weyen was unable to pay his debts (R. 12), having $60,000 of unsecured creditors and $140,000 of creditors holding securities on logging equipment (R. 39, 102), and on that date he legally assigned to appellant Defenbach all of his property, including eight policies interpleaded in the District Court, seven with Sun Life and one with the Maccabees (R. 3, 4, 12), for the benefit of his creditors (R. 12). Weyen died April 16, 1955 (R. 102) and the insurers having interpleaded, the issues were between appellant, the children of Weyen, and Stanfill, the trustee. Two actions were brought, one by Sun Life involving seven policies totaling $60,302.94 (R. 21) and the other by the Maccabees totaling $5,731.49 (R. 4) It was decided to try the Sun Life case, and this was done in one day, October 18, 1955 (R. 8) The parties stipulated on April 16, 1956, that since the issues were the same, decision of the Maccabee's case, involving only the sum mentioned, would abide the decision in the Sun Life case (R. 3-5), which was then on appeal to this Court (R.3). The Maccabees' case was never tried but judgment was entered on stipulation after the final decision of this Court (R. 32-35).

Judgment was entered in the Sun Life case on December 30, 1955, awarding the policy proceeds to appel-

lant Defenbach, who was represented throughout the proceeding by appellees Etter and Keeton. Appellee Etter maintains his office in Spokane, Washington, and appellant Defenbach and appellee Keeton have their offices in Lewiston, Idaho. The opinion of the District Court is reported sub nom *Sun Life Assurance Company of Canada v. Weyen* 136 Fed. Supp 592. Thereafter the case was appealed to this Court, and appellees Etter and Keeton having resigned, appellant (appellee there) was represented by Harold Coffin and Paine, Lowe, Coffin, Ennis & Herman. The fee charged and paid in advance by Defenbach was $2,500, plus costs (R. 125). The opinion of this Court is as yet unreported but was published on January 4, 1957, in Cause No. 15080, which affirmed the ruling of the District Court that appellant Defenbach was entitled to the policy proceeds. Both the opinion of the District Judge and of this Court turned on a single Washington case, *Massachusetts Mutual Life Insurance Company v. Bank of California,* 187 Wash. 565, 60 P. (2d) 675. That this one case is the basis of the decision of both Courts is admitted in the testimony of Mr. Etter, one of appellees (R. 76-77).

PLEADINGS AND PROCEEDINGS

On January 20, 1956, while the Sun Life case was on appeal to this Court, Etter and Keeton filed lien claims in both cases, alleging the value of their services up to June 7, 1956, was $16,500 (R. 6-7). On January 22 ,1957, they served and filed a petition to foreclose the liens filed (R. 19-22). The answer of appellant Defendant (R. 23-24) admitted that Etter and Keeton had repre-

sented him in the two actions; that he was willing to have the fee fixed; that the original employment was Keeton's but Etter was later employed by Keeton, which employment was later ratified by Defenbach; and that the two actions were successful. It was denied that $16,500 was either reasonable or agreed (R. 23). The issue was resolved to the single question of how much should be allowed Etter and Keeton for services in the two cases in the trial court and partially on appeal, up to and including June 7, 1956, when Paine, Lowe, Coffin, Ennis & Herman took over the cases as attorneys for appellee in this Court.

The case was tried the afternoon of January 31, 1957 (R. 31), and the Court's findings and judgment were signed February 8, 1957. The Court found there was no express contract for attorneys' fees but that Etter and Keeton rendered successful services of the "fair and reasonable value" of $15,000 (R. 26-27). The Court further found that notwithstanding there was no contract,

> "That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully." (R. 26)

TRIAL EVIDENCE

At the beginning of trial Mr. McKevitt, representing appellees, stated:

"THE COURT: Is it a claimed contractual fee?

"Mr. McKEVITT: . . . However, I will say at the outset now that we are not in a position to establish a definite contract between these attorneys and Mr. Defenbach as to any fee, contingent or otherwise, and we are here on the basis that this amount of $16,500 is a reasonable fee, under all the circumstances, to be allowed." (R. 33)

Keeton testified that he prepared the Weyen crediors' pooling agreement wherein Defenbach was named trustee (R. 38). In Defenbach's capacity as assignee for the benefit of creditors of the deceased Weyen, Keeton acted as Defenbach's attorney in Idaho. Defenbach had been cautioned by the Internal Revenue Bureau that the United States claimed priority for tax liens and timber trespass (R. 46), and Mr. Keeton advised him on many occasions that unless the insurance proceeds were recovered for the benefit of the estate,

". . . there wouldn't be anything for anyone and that he couldn't disburse any of those funds, even for his hotel bills or mine, I told him that, on account of these tax liens; unless the $66,000 case was won it would be better for him to give all the money, the $8,700 or whatever it is, to the government and that would be the end of it. I had that conversation with him." (R. 127)

The $8,700 was collected by Defenbach immediately following Weyen's death on a health and accident policy.

According to Keeton, the day before trial of the Sun Life case, that is, the day before October 18, 1955, Keeton and Defenbach had come from Lewiston, Idaho, to

Spokane for the trial. Keeton told Defenbach he had prepared a letter he was going to give him concerning a fee arrangement "as we had none so far". Defenbach said he could not agree to any fee because he had no authority from his creditors' committee. Keeton said he went over to Etter's office and told him what Defenbach had said, and the three of them met in the Ridpath Hotel (R. 49). Mr. Etter had been hired by Keeton on July 25, 1955 (R. 50). According to Keeton, at the hotel Defenbach reiterated he was afraid of tax liens and could not contract for fees, and that at that time Mr. Etter asked for a retainer. When Defenbach refused, Etter stated, "We take these cases on a contingent fee", and he further stated the usual percentage was twenty-five per cent if settled, thirty per cent if tried, and forty per cent if appealed (R. 52). Defenbach said that while he had no objection to it, he could not agree to anything. The matter was left there (R. 52). Mr. Keeton stated that it had been agreed between him and Defenbach that a bill would not be rendered until the conclusion of the cases (R. 58) and Keeton said he hoped to collect a flat fee if the litigation was unsuccessful and if the government didn't take it all (R. 62, 63). The claim of the government was about $36,000 (Ex. C; R. 130). Other than the conversation at the Ridpath Hotel, according to Mr. Keeton, the only demands for a fee arrangement were by Mr. Etter (R. 63).

Mr. Etter testified that his recollection of the fee conversation was that they were both at the Ridpath Hotel and at his office (R. 71). He testified that the day

before trial, that is, October 17, 1955, he, Etter, told Keeton:

> "I should like to have it on at least a partly retainer basis . . . I had made a proposal on fees before and I repeated it generally to Mr. Defenbach. I had suggested if he wanted us to try this case, take it up on through appeal, that if he was willing to pay a retainer of $2,000, it would be acceptable through the courts on a prescribed fee of 20 or 30 per cent. . .
>
> "Mr. Defenbach explained to me that he wouldn't be able to pay anything, then or on appeal. In fact when I questioned him, he told me that if we should lose or if there was some necessity for appellate procedure, that he still couldn't pay anything and that it would be incumbent on the attorneys to assume all of the costs of the litigation and the costs of the appeal and all the rest of it . . .
>
> "I told him that as long as we were in the case, we would try it out on that basis . . .
>
> "He made his position clear that he couldn't pay and, although I was disappointed—I hate to take a case on that type arrangement—we agreed that we would do it, and that was it.
>
> "Q. Was it your feeling at that time from your knowledge of the whole situation that unless there was a successful outcome to this suit here and above, that you and Mr. Keeton would be out your time and out of pocket?
>
> "A. Absolutely . . . " (R. 71-74)

With regard to the testimony concerning conversations relating to fees, Mr. Defenbach testified that he did not meet Mr. Etter until the day of the trial and that he could not have met him before that date because he did not arrive in Spokane from Lewiston until late at night on October 17, 1955 (R. 108).

Defenbach further testified that shortly after April 15, 1955, he and Keeton agreed not to charge any fees against the fund until the Idaho court officially closed the estate after conclusion of the litigation on the insurance policies (R. 103). Keeton says he was a proper person to represent Defenbach in the Idaho assignment estate because he was familiar with Weyen's affairs and Weyen owed him some $1,900 (R. 105). Defenbach receieved $8,700 on a health and accident policy and had several meetings with agents of the Internal Revenue Department through May and June, 1955 (R. 106). Defenbach told Keeton he had talked with the Internal Revenue Department officials, that he had informed the officials he had $8,700 and had asked to use it for administrative expenses, and that the Internal Revenue Department had taken the position that it would not interfere with the use of the money for costs of administration (R. 107). Keeton was told that the money was "practically dedicated to the purpose of protecting the estate" (R. 106) by payment of attorneys' fees, retainer and costs (R. 116).

Contrary to the testimony of Mr. Etter, Defenbach testified that he and Keeton met in the Ridpath Hotel lobby on the morning of October 18, 1955, the day of the trial (R. 108), and Keeton then asked for a fee of "$7,500, win, lose or draw, and $15,000 in case we win" (R. 109). Keeton in his testimony categorically denied this conversation (R. 127). Defenbach testified he told Keeton he could not agree without the consent of his creditors' committee (R. 109). Defenbach categorically denied that he ever discussed fees with Etter at any time and stated

that the first time he ever heard Etter mention fees was in his letter of March 26, 1956 (Ex. E; R. 135) hereinafter referred to.

About Apil 1, 1956, at Keeton's office, Defenbach told Keeton he thought the agreement not to assess fees until the litigation was over should be adhered to (R. 111). He then met with his committee and, following this, tendered $3,750 to pay Mr. Etter's fee, alone. This was shortly after April 13, 1956, and was tendered pursuant to Mr. Etter's offer contained in his letter of April 13, 1956 (Ex. E; R. 140-141), hereinafter referred to. No costs were tendered because Keeton never billed Defenbach for them (R. 116). This testimony of Defenbach is bolstered by Mr. Keeton's admission that he advised Mr. Defenbach that no disbursements could be made unless Defenbach was successful in the insurance litigation and that the $8,700 theretofore collected had to be used for the payment of tax liens (R. 127).

Regarding the conflict between his testimony and that of Keeton and Etter, Defenbach stated that Mr. Etter and Mr. Keeton were mistaken in their testimony that any conversations were had prior to the day of trial because Defenbach did not arrive in Spokane until late in the evening of October 17, 1955 and was not available until the following day. In his cross examination he again reiterated that there was never any personal discussion between him and Mr. Etter, nor any conversation in Mr. Etter's presence, concerning compensation of Keeton and Etter (R. 117).

The evidence discloses four opinions as to the reasonable value of the work done in the case up to and including June 7, 1956, which work included all work at the trial level and all proceedings necessary to perfect the appeal prior to service of appellant's brief (R. 143-144). Keeton's opinion was that a twenty-five per cent attorneys' fee was reasonable, but he admitted on cross examination that the trial took only one day (R. 55-56), from ten a.m. until three p.m., and that there was no motion to dismiss or pre-trial conference. (R. 57). Mr. Etter testified it was his opinion that twenty-five per cent of the recovery was a reasonable fee (R. 77). Del Cary Smith, a Spokane lawyer, testified to the same effect (R. 101), and Marcus Ware, an Idaho lawyer, testified that one-third would be reasonable. Meesrs. Ware and Smith testified on the basis of a hypothetical question which assumed that compensation for Defenbach, as trustee and Keeton and Etter, as attorneys, *was solely dependent upon success of the two insurance actions* (R. 91). On cross examination of Ware it was developed, and the record shows, that the government claimed less than $36,000 (R. 130; Ex. C) and that there was $8,700 in the estate before the actions were started (R. 105, 42). It was Mr. Ware's opinion on cross examination and in light of these additional facts that while all contingent fee cases should be on a one-third basis (R. 96), had Defenbach had available $2,000 for fees and $500 for costs, payable in any event, a fee of $9,000 to $13,000 would be warranted (R. 99).

As to the amount of work done by appellees, the case was tried on October 18, 1955 and took approximately

three hours of trial time. There was no motion to dismiss or pretrial conference (R. 56-7). The case evolved and turned on a pure question of law, rather than one of fact (R. 62). Keeton testified there were some background facts, which were never received in evidence in the former case, bearing on Weyen's intent (R. 63-4) but neither Mr. Etter nor Mr. Keeton was able to state any factual issues which were present and the record is devoid of any specific example of such factual issues. Keeton stated that he and Mr. Etter worked eight full days, over one hundred hours, in preparation of a written brief for the trial judge, which was called for after conclusion of the trial (R. 68). They also worked at night and they went all the way through "the trust law" and "West and other indexes."

> "A. We looked through the trust law day and day out, through the West indexes and through all the other indexes to find *really the important case that this whole litigation hinged on,* and finally at the end found it under some place where we never expected to look under—insurance—and we really spent all that time trying to find a case relevant and close to this one to submit to the Judge in our brief. If we had found the case first, it would not have taken us so long, but we found the case last.
>
> "Q. Then when you briefed the question under the subject of insurance and the assignability of insurance—
>
> "A. Finally found it there, and then were able to prepare the brief in about one more day by looking through there." (R. 69)

Mr. Etter testified to approximately the same length of time and effort spent on the case. He stated:

> "Q. In addition to the time spent in the actual trial of the case, Max, can you estimate for us the time

that you personally put in legal research that was required in various phases of this litigaiton?

"A. . . . *I wired the West Publishing Company, who provide a service, and set up the facts in this case and asked them if they could advise us of any leading cases or cases that had recently come into the publishing company that would bear on this subject. I received a telegram back from the West Publishing Company citing the same cases that I had found that were on the trust end of it and that were on the matter of will construction, I think it was, and other matters of that kind, with a later letter from them also on phases of it that were not determinative of the controversy, and I wasn't satisfied . . .*" (R. 74-5)

". . . .

"*So, finally, in going through the research, Mr. McKevitt, I went into insurance, and after being into the insurance for, about oh,* 20 *or* 30 *minutes, I came on to the case of Massachusetts vs. California Bank, I think in* 187 *Washington . . .*" (R. 76)

"A . . . because state law governs, jurisdiction having been established, so then it became an easy matter to wind up in the afternoon, get it dictated and sent to Judge Driver. We had spent eight days and sent it the ninth day, or something like that. That was the conclusion of the work.

"A. We later then submitted that to other counsel and let them use it, and the Appellate Court decided on the same case. (R. 76-7)

"Q. The result of your labors?

"A. That's right." (R. 77)

The effect of the testimony of appellees is that they spent over one hundred hours working day and night to find a single Washington case, which they admitted was determinative (R. 69, 76).

Mr. Defenbach did not write any letters to appellees with regard to their compensation. As has been stated, all his dealings were with Mr. Keeton prior to trial, but certain letters were sent between Keeton and Etter, with copies to Mr. Defenbach, which are very significant. On March 26, 1956, Etter wrote to Keeton (Ex. E; R. 135) and admitted that no arrangement whatever had been made as to fees and suggested a cash payment of half of twenty per cent of the recovery, or $6,000, plus $7,500 for the pending appeal, plus an additional ten per cent if the appeal was successful. He asked Keeton to communicate this to Defenbach, which Keeton did by letter, on April 11, 1956 (Ex. E; R. 139). A copy of Etter's letter was enclosed. On April 13, 1956, Etter again wrote to Keeton. That letter read, in part:

> "Consequently, I propose that in the event he will pay my fees on the present basis which I wrote about, I shall, and do hereby, agree to hold Mr. Defenbach harmless against the probability or actuality of him having to make good any part of the fees paid to me with the following exception. *It was my understanding that in any event we were to be paid a flat fee for this litigation—that is, the first Sun Life cases and the Maccabees case. I think that the flat guarantee to which we should be entitled for these cases, and the appeal, should be* $3750.00, *plus costs and expenses in the event of ultimate loss.* Therefore, if Mr. Defenbach will pay me now, in accord with my letter to you, I would, as I have said, hold him harmless for any personal responsibility for any of the sums paid me as fees, minus, however, one-half of the agreed fee which I understand will be paid—win, lose or draw . . . " (R. 140-141; italics ours.)

Mr. Etter stated on cross examination that he had expected a minimum fee of $3,750 for the trial of the cases (R. 79).

On June 1, 1956, Etter wrote to Defenbach. This was after Mr. Defenbach had agreed to pay $3,750 for Mr. Etter's services (R. 113-114). In his letter of June 1 Mr. Etter stated that he had taken note of Mr. Defenbach's tender of $3,750 and stated, "I advise you that your proposal is rejected." (R. 142) Etter then offered to settle for $8,250, plus $4,250 in costs and expenses for the appeal if hired to prosecute it, or, in the alternative, a contingent fee of $6,000 for the appeal or, if he desired a straight contingent fee contract, then thirty per cent was agreeable.

On receipt of a copy of this letter Keeton wrote Defenbach on June 6, 1956 (Ex. B; R. 131) and stated, in part:

> " . . . I feel that it was a mistake on the part of all parties to have entered into this litigation without some understanding in writing regarding the payment of attorney fees." (R. 133-134)

The effect of this letter was that appellees withdrew from the case.

SPECIFICATIONS OF ERROR

I

The Court erred in giving and making its Findings of Fact III, on February 8, 1957 (R. 26), as follows:

"That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully."

for the reason that said finding is not supported by the evidence.

II

The court erred in giving and making its Findings of Fact IV (R. 26), as follows:

"That the fair and reasonable value of the services rendered by said petitioners on behalf of the defendant, Ralph B. Defenbach, as Trustee, is the sum of $15,000.00."

for the reason that said finding is not supported by the evidence and is contrary to law.

III

The court erred in giving and making its Conclusion of Law I (R. 26), as follows:

"That petitioners are entitled to recover for their services the sum of $15,000.00."

for the reason that said Conclusion of Law is not supsupported by the evidence and is contrary to law.

IV

The court erred in entering its judgment dated February 8, 1957 (R. 28-29), wherein appellees were awarded $15,000.00 as attorneys' fees for the reason that it is not supported by the evidence and is contrary to law.

ARGUMENT OF THE CASE

1. THE COURT ERRED IN FINDING THAT APPELLEES' EMPLOYMENT WAS ON A CONTINGENT FEE ARRANGEMENT (Specification of Error No. 1).

In its Finding of Fact No. III the court found that:

(a) The employment was on the basis of a contingent fee;

(b) Barring recovery in the suits involved, appellees would not have been paid a flat fee.

This finding is made in the face of the admissions by Mr. Keeton (R. 52) that there was no agreement as to fee and of Mr. Etter's correspondence wherein he stated:

> "It was my understanding in any event we were to be paid a flat fee for this litigation—that the flat fee to which we should be entitled for these cases, and the appeal, *should be* $3,750, *plus costs and expenses in event of ultimate loss . . .* " (Italics ours; Ex. E; R. 140-141)

In the same letter Mr. Etter referred to the agreed fee "which I understand will be paid—win, lose or draw". (Ex. E; R. 141).

A careful reading of Mr. Etter's letters (Ex. E; R. 135 to 144) completely negatives the proposition that counsel ever intended to be precluded from claiming a fee in the event the cases were lost. Mr. Keeton testified:

> "Q. If the big case was lost, you hoped to still collect out of the estate, didn't you?

"A. If the government didn't take it all."

It should at all times be borne in mind that appellant had some $8,700 (R. 105) of other moneys not involved in this litigation and that although liens of the United States government were claimed thereon an agreement had been worked out with the government that the funds could be used to prosecute the actions in which Messrs. Keeton and Etter were involved (R. 106-107), and that the funds were so used in the form of a tender of $3,750 to Mr. Etter (R. 113) and to pay other counsel attorneys' fees of $2,500 and costs of $500 for services on appeal to the Circuit Court of Appeals (R. 125).

From a reading of the entire record one can only conclude that there was never any intention, agreement or understanding limiting appellees to compensation for ultimate success in the actions in which they were engaged.

2. THE COURT ERRED IN FINDING THAT $15,000 WAS REASONABLE COMPENSATION (Specifications of Error Nos. II, III and IV).

These specifications will be discussed together.

It is to be noted that the court does not fix the fee at $15,000 on the basis of a contract but rather on the basis of a quantum meruit, but that it apparently justifies the allowance on the theory that appellees had precluded themselves from a fee unless a recovery was had. It is difficult for us to understand how a case which hinges on a single Washington case, which turns entirely on law and which was presented in less than a day, can warrant

such an allowance. We say this, even after making allowance for 100 hours of preparation and search for the controlling Washington decision, which they finally found.

The testimony of Mr. Ware and Mr. Smith is of no value in determining the question of a reasonable fee for the reason that the hypothetical question propounded assumed "that it was fully understood by defendant, Ralph B. Defenbach that the compensation, if any, for his attorneys would be completely dependent upon the outcome of the action above referred to, viz., that there would have to be a judgment of the above entitled Court, final after a possible appeal in favor of the defendant, Ralph B. Defenbach as Trustee" (R. 91). With the collapse of that hypothesis, their testimony is of no assistance to the Court. The same situation applies to the testimony of appellees, who both testified on direct examination that their compensation was dependent on a recovery in the actions which are the subject of this controversy but who both admitted on cross examination and by their correspondence that they fully expected to have a minimum fee, "win, lose or draw". Not only did they expect a flat, minimum or guaranteed fee, but they demanded the same.

An employment arrangement, to be binding, must be bi-lateral. Had the case been lost, on the present record it is quite apparent that appellees had not barred themselves from recovering a fee from appellant, either in his fiduciary capacity or in his personal capacity.

CONCLUSION

Accepting the testimony of appellees in its most favorable light, we submit that no agreement or understanding as to compensation was ever made between the parties; that the court erred in finding that there was an employment on a contingent fee basis; that appellees never gave up their right to claim compensation in the event the actions were lost; that appellees steadfastly maintained and asserted the right to some compensation, irrespective of the outcome of the cases; that in the light of the facts, the expert testimony is not applicable.

It follows, therefore, that this Court should either modify the judgment of the District Court or remand the matter for further proceedings consistent with the proposition that the fee to be allowed should be simply the reasonable value of the services rendered.

Respectfully submitted,

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